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No. 10-808
CAPITAL CASE

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

ALFONSO MORRIS, *Petitioner,*

v.

STATE OF ALABAMA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

BRIEF IN OPPOSITION OF THE STATE OF ALABAMA

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February 18, 2011

CAPITAL CASE

QUESTION PRESENTED

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the execution of mentally retarded defendants violates the Eighth Amendment, but left to the States the task of developing the definition of mental retardation and the procedures for determining who is mentally retarded. Under the framework the Alabama Supreme Court established in response, to be found mentally retarded, a capital defendant has the burden of proving three factors: "(1) significantly subaverage intellectual functioning (i.e., an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; *and* (3) the manifestation of these problems during the defendant's developmental period (i.e., before the defendant reached age 18)." *Smith v. State*, No. 1060427, ___ So. 2d ___, 2007 WL 1519869, at *8 (Ala. May 25, 2007). Petitioner Alfonso Morris does not challenge that framework generally, but instead raises the following two factbound questions about its application to this particular case by Alabama's intermediate court of appeals:

I. The Alabama Court of Criminal Appeals held that the trial court properly exercised its discretion in finding that Morris failed to prove he was mentally retarded because he did not establish an accurate IQ score below 70. The Court of Criminal Appeals found, among other things, that the evidence supported the trial court's finding that Morris was

"malingering"—*i.e.*, pretending to be less intelligent than he in fact is—when he scored below 70 on certain tests. Did the Court of Criminal Appeals err when it held that the trial court had not abused its discretion on this front?

II. The Court of Criminal Appeals also held that the trial court properly exercised its discretion in weighing the evidence—which included Morris's behavior while incarcerated—and concluded that Morris failed to prove that he suffers from substantial deficits in adaptive behavior. Did the Court of Criminal Appeals err in holding that the trial court had not abused its discretion on this front?

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STATEMENT OF THE CASE

A. Proceedings Below

The State indicted Morris on two counts of capital murder. As the Court of Criminal Appeals recounted in detail below, the charges stemmed from effectively uncontroverted allegations that Morris beat an 85-year-old, 92-pound woman to death while burglarizing her home. Pet. App. 2a–8a. Morris was tried for these crimes three times. The first trial resulted in a conviction, a 10-2 jury recommendation for a death sentence, and the trial court's imposition of a death sentence. Pet. App. 166a. But the Alabama Court of Criminal Appeals granted Morris a new trial based the trial court's failure to provide him funds for a mental-health expert in that first trial. Pet. App. 206a. The second trial resulted in a hung jury and therefore a mistrial. Pet. App. 2a. The third trial resulted in another guilty verdict, another jury recommendation by a 10-2 vote for a death sentence, and another court-imposed death sentence. Pet. App. 129a–31a.

The critical facts for present purposes relate to the *Atkins* hearing the trial court conducted before Morris's second trial. During that hearing, the trial court found that Morris was not mentally retarded, and thus was eligible to receive the death sentence under *Atkins*. Pet. App. 13a–24a, 143a–146a.

1. The Atkins *Hearing*

At the *Atkins* hearing, the State introduced numerous witnesses, many of whom Morris either hardly mentions or does not mention at all.

1. Dr. Glen King. First and foremost, Dr. Glen King, a clinical and forensic psychologist, testified that Morris is not mentally retarded. Pet. App. 22a-23a. King concluded that Morris functioned in the high borderline to low average range of intellectual ability with an IQ somewhere in the low 80s. Pet. App. 22a. King testified that Morris had adaptive skills and was able to drive and support himself. Pet. App. 22a. He noted that his opinion was consistent with the opinion of a psychiatrist who examined Morris before his first trial. Pet. App. 22a.

King testified that to the extent others might have concluded that Morris was mentally retarded, the likely explanation was that Morris was "malingering"—or, in other words, was falsely portraying himself as mentally retarded. Pet. App. 20a–21a. Although Morris scored a 41 on an IQ test King had administered, King explained that Morris was "clearly malingering" when he took that test. Pet. App. 20a. King noted that Morris's score was "totally inconsistent" with his general presentation during the interview. Pet. App. 20a. King also noted that people with extreme mental retardation, which Morris clearly does not have, could have answered some of the questions Morris got wrong. Pet. App. 20a. For instance, Morris claimed that a picture of a cat and a ball was in fact a picture of a cat and a child. Pet. App. 20a-22a. On a separate test, Morris obtained a score that is generally received by people who are not functional and cannot even bathe themselves. Pet. App. 21a–22a. In responding to that test, he had claimed that he could not answer a telephone or cut meat. Pet. App. 22a. King had

given Morris a test designed to determine if the person taking the test was intentionally giving wrong answers, and the results confirmed that Morris was malingering. Pet. App. 22a.

2. Wyatt Rhone. Wyatt Rhone, a patient-education coordinator at a medical facility where Morris was evaluated, corroborated King's opinion that Morris is far more intelligent than he had let on. Pet. App. 16a–17a. Rhone met with Morris six times to administer basic assessment tests. Pet. App. 16a. Morris scored a zero on his first test and again scored a zero four to six weeks later. Pet. App. 16a. The flat-zero scores were not credible because Morris was otherwise able to engage in complex thought, such as recalling specific events from television shows. Pet. App. 16a–17a. Even 10 to 11 months later, Morris still scored a zero on that same test and another basic test. Pet. App. 17a. Rhone concluded that Morris was faking, and testified that "[i]f [Morris] was managing to answer all of them wrong, that was an indication of intellectual ability to reason that out." Pet. App. 17a.

3. Vicki Webster. Vicki Webster, a nurse in the jail where Morris had been detained, further confirmed that Morris was capable of significant cognitive functioning. She had met with him at least six times concerning about his medical condition. Pet. App. 17a. During those meetings, he was able to discuss his condition and treatment and was able to take advantage of medical services and fill out paperwork. Pet. App. 17a.

4. Ned Whitehead. Ned Whitehead, a recordkeeper for the jail, also provided evidence that Morris was malingering. Whitehead identified visitors' logs showing that Morris's family had visited him several times in jail. Pet. App. 17a. This evidence refuted Morris's statement, relayed by his own expert, that he had not seen his family and that they did not know where he was located. Pet. App. 17a-18a.

5. Terry Love. Terry Love, an official with the Alabama Probation and Parole Office, provided testimony that bolstered the inference that Morris's test scores had been the product of malingering. Love had interviewed Morris while conducting his pre-sentence investigation in 2003. Pet. App. 18a. Morris had provided Love with information such as his family members' names and the dates they died, his employment history, his involvement in gambling and drug dealing, and the names and birthdays of his children. Pet. App. 18a.

6. Phillip Russell. Phillip Russell, the police officer who interviewed Morris after his arrest, provided more evidence that Morris is far more intelligent than his test scores indicate. During the interview, Morris had tried to conceal his identity by giving Russell his brother's name and date of birth. Pet. App. 18a. Morris had also signed his statement using his brother's name. Pet. App. 18a.

7. Steven Drexler. Finally, Steven Drexler, a handwriting specialist, offered another perspective on Morris's intelligence. Drexler had taken several writing samples from Morris to compare to court documents he had filed. Pet. App. 18a. Morris had altered his handwriting in the samples, and Drexler testified that "it would take a great deal of mental fortitude to be able to maintain that style and not resort back to your normal habits." Pet. App. 18a-19a.

8. Morris's witnesses. Morris presented two witnesses, and neither provided conclusive proof that Morris is in fact mentally retarded. Dr. Allen Shealy testified that he believed Morris to be mildly retarded, but he admitted that he had failed to administer any test designed to assess malingering. Pet. App. 15a. Likewise, Morris's sister simply testified that he had been a slow learner in school. Pet. App. 15a.

After considering all this testimony, the trial court applied the three factors developed by the Alabama Supreme Court for assessing *Atkins* claims and ultimately found that Morris had not established that he is mentally retarded. Pet. App. 23a. First, crediting King's testimony that Morris was malingering, the court found that Morris failed to establish a valid, accurate IQ score below 70 and thus that he could not prove that he had significantly subaverage intellectual functioning. Pet. App. 23a. Second, the trial court found that based on all the evidence, Morris was able to adapt and function. Pet. App. 23a. Third, the trial court found that in light of school records showing that Morris made B's,

C's, and D's and was not in special education classes, Morris had failed to show that retardation had manifested itself before the age of 18. Pet. App. 23a–24a. The trial court therefore rejected Morris's *Atkins* argument and found him eligible for the death penalty. Pet. App. 145a.

2. The Court of Criminal Appeals' decision

After the jury convicted Morris and the trial court imposed a death sentence, Pet. App. 124a–142a, the Alabama Court of Criminal Appeals affirmed the conviction and sentence, Pet. App. 24a–29a. Rejecting Morris's claim that the trial court was required to credit his own expert's testimony alone, the Court of Criminal Appeals explained that "Morris's specific arguments raised on appeal address conflicts in the evidence, which were properly weighed and evaluated by the trial court as the finder of fact." Pet. App. 29a. "Therefore," the Court concluded, "the trial court did not err in determining that Morris is not mentally retarded for purposes of *Atkins*." Pet. App. 29a.

The Alabama Supreme Court then denied Morris's petition for a writ of certiorari. Pet. App. 122a–123a.

REASONS WHY THE PETITION SHOULD BE DENIED

Morris has not raised any certworthy issue. The splits he asserts are illusory, and he is seeking no

more than factbound error correction of the sound decision of an intermediate state appellate court.

This Court has left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences" on mentally retarded defendants. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002). In accordance with that directive, the Alabama Supreme Court developed a three-part test for determining whether a defendant is ineligible for the death penalty under *Atkins*, and the Alabama appellate courts have held that the application of that test will generally be "the function of the factfinder ...which [has] the opportunity to personally observe the witnesses and assess their credibility." *Byrd v. State*, No. CR-07-0113, ___ So. 3d ___, 2009 WL 1164985 at *3 (Ala. Crim. App. May 1, 2009). Sifting through that evidence here, the Alabama Court of Criminal Appeals found that "Morris has not proved by a preponderance of the evidence that he is mentally retarded, such that the determination by the trial court, pursuant to the discretion vested in it as fact finder, should be reversed." Pet. App. 24a. In light of testimony from the State's expert that Morris was not mentally retarded—testimony the trial court was entitled to credit, and testimony that Morris hardly mentions in his cert petition—that conclusion was eminently sound.

But in the very least, nothing about that conclusion warrants certiorari. Morris does not challenge the Alabama Supreme Court's three-part test for assessing *Atkins* challenges. He instead challenges an intermediate state appellate court's application of those standards to the specific facts of

this case. He thus seeks no more than the review of asserted "erroneous factual findings," SUP. CT. R. 10, and such review is not the proper domain of this Court. Although Morris has tried to overcome this problem by asserting that the Alabama Court of Criminal Appeals' methodology broke from methodologies used by other courts, he is simply wrong about that. There is no split here, and no other reason why this Court should grant certiorari.

I. This Court should deny certiorari on the first question presented concerning whether malingering automatically forecloses a finding of mental retardation.

There are at least two reasons why this Court should decline to review the first question presented. First, Morris is wrong when he asserts that the Court of Criminal Appeals exacerbated a split on whether evidence of malingering "automatically" compels a finding that the defendant is not retarded. Pet. i. Second, even if this Court were to grant cert on this issue and reverse the Court of Criminal Appeals' decision on the malingering issue, that disposition would not affect the outcome in this case.

A. There is no split on whether "malingering alone can refute a finding" of mental retardation.

Morris misreads both the Court of Criminal Appeals' decision and the jurisprudence of other states when he asserts that the decision below deepened a split on whether "malingering alone can refute a finding" of mental retardation. Pet. 13. As

explained below, the Court of Criminal Appeals did not hold that "malingering alone" precludes any possibility that a defendant is mentally retarded for *Atkins* purposes. *Id.* It instead viewed the evidence of malingering as one of *many* factors justifying the trial court's finding that Morris is not, in fact, mentally retarded. And that conclusion is fully consistent with the way other courts have dealt with this issue when implementing *Atkins*.

1. The Court of Criminal Appeals did not hold that evidence of malingering "necessarily forecloses" a finding that the defendant is retarded.

In asserting that there is a split on the first question presented, Morris has fundamentally misinterpreted the decision of the Court of Criminal Appeals. At no point did that court make a sweeping determination that evidence of a defendant's malingering "[n]ecessarily [f]orecloses" a finding of subaverage intellectual functioning. Pet. 13. Instead, the court reviewed the extensive evidence presented during the *Atkins* hearing and determined that the trial court "did not exceed its discretion" in finding that Morris was not mentally retarded. Pet. App. 24a. To be sure, some of that evidence included testimony that Morris's responses during the assessments must have been the result of malingering. But that evidence also included testimony from witnesses such as Dr. Glen King, who affirmatively concluded that Morris functioned in the high-borderline-to-low-average range of intellectual functioning with an IQ possibly in the low 80s. *See supra* at 2. Because the trial court was

entitled to credit that testimony over the testimony of Morris's expert, it is not accurate to say that the Court of Criminal Appeals held that evidence of malingering, standing alone, "automatically compel[s] the conclusion that the defendant is not mentally retarded." Pet. i. Instead, the Court of Criminal Appeals' decision simply stands for the commonsense proposition that a trial court may consider evidence that the defendant malingered on test responses when determining whether he or she is retarded for *Atkins* purposes.

That conclusion makes eminent sense, and Morris does not appear to challenge its logic here. Intelligent death-row inmates who know about *Atkins* will have every incentive to shoot for low scores on their aptitude tests. When a clearly functioning person who is facing the death penalty manages to score an IQ of 41, there is good reason to think that he is not, in fact, mentally retarded or anywhere close to the line. There is no reason why trial courts cannot consider evidence of malingering, among many other factors, in determining whether a defendant is mentally retarded for *Atkins* purposes. The Court of Criminal Appeals' decision was thus entirely sound.

2. *The Court of Criminal Appeals' decision is consistent with decisions from other jurisdictions.*

Because the Court of Criminal Appeals merely held that the evidence of malingering was relevant, rather than dispositive, Morris has identified no split between that court and other state courts that have touched on this issue. The Court of Criminal

Appeals did not profess to be creating a split or purport to be aware of one, and with good reason. Like the Court of Criminal Appeals, courts in other states have analyzed evidence of malingering as one of many factors in determining, under the standards those states have established to implement *Atkins*, whether a defendant is mentally retarded and thus ineligible for the death penalty.

For example, Mississippi—the sole state Morris says is on the same side of this illusory "split" as the Court of Criminal Appeals—has never said that malingering automatically forecloses an inference of mental retardation. In the decision Morris cites, *Chase v. State*, 873 So. 2d 1013 (Miss. 2004), the Mississippi Supreme Court simply established procedural requirements to guide Mississippi courts in "reaching a determination of mental retardation." *Id.* at 1029. The court there said that the relevant considerations include whether the defendant had taken certain tests and whether the defendant was malingering. *Id.* The Mississippi Supreme Court never held as a matter of law that evidence of malingering "automatically forecloses" a finding of subaverage intellectual functioning.

Likewise, Texas—the sole state Morris says is on the other side of this supposed "split"—has not said anything meaningfully different from what the Court of Criminal Appeals said below. The only decision Morris cites from Texas—the Texas Court of Criminal Appeals' opinion in *Ex parte Van Alstyne*, 239 S.W.3d 815 (Tex. Crim. App. 2007)—did not address any argument that malingering can *automatically* foreclose a finding of subaverage intellectual functioning. All the Texas court did was

assess whether, in the circumstances of that particular case, there was reason to believe that the defendant had faked a result on his IQ test. The Texas Court of Criminal Appeals, acting as factfinder, found that he had not. In the footnote Morris cites, the court found that, although the state's expert had testified that he was concerned about whether the defendant was malingering, the defense expert had in fact tested for malingering and found that the defendant was being straightforward. *See Van Alstyne*, 239 S.W.3d at 818 n.8. It was on that basis that the Court of Criminal Appeals noted that "regardless of whether the applicant may have been malingering in an attempt to obtain a lower score *ten days later with [the State's expert],* the test results obtained by [the defendant's expert], placing the [defendant] within the range of the mildly mentally retarded, remain valid." *Van Alstyne*, 239 S.W.3d at 818 n.8 (emphasis added). This contextual weighing of the evidence—and, particularly, this placement of considerable weight on the results of a test given to determine whether the defendant was malingering—is fully consistent with the Alabama Court of Criminal Appeals' fact-driven analysis here.

Even if the state courts' approaches had diverged along these lines, a 2-1 split involving one decision by an intermediate state court of appeals would hardly call for this Court's immediate intervention. But there is no split here. For that reason alone, this Court should deny cert on the first question.

B. Even if this Court were to reverse on the first question presented, it would not change the result.

Even if there were a split here, this case would provide a poor vehicle to resolve it. For even if this Court were to reverse the Court of Criminal Appeals' decision on this issue, the result for Morris would remain the same. Under the Alabama Supreme Court's three-part test for determining whether a defendant is mentally retarded for *Atkins* purposes, the defendant must show: "(1) significantly subaverage intellectual functioning (i.e., an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; *and* (3) the manifestation of these problems during the defendant's developmental period (i.e., before the defendant reached age 18)." *Smith v. State*, No. 1060427, ___ So. 2d ___, 2007 WL 1519869 at *8 (Ala. May 25, 2007). Critically for present purposes, "*[a]ll three* factors must be met in order for a person to be classified as mentally retarded." *Id.* (emphasis added). Yet, the first question presented here relates solely to the lower court's holding on the first factor. While Morris's second question presented addresses the second of these factors, Morris makes no attempt to challenge the Court of Criminal Appeals' separate ruling that he also failed to establish the third factor. *See* Pet. App. 27a. A ruling for Morris on the first question would thus not affect the ultimate outcome in this case. So even if there were a split on this question and reason to believe that the lower court were wrong on this issue, this case would not be the right vehicle to address it.

II. This Court should deny certiorari on the second question presented concerning whether evidence of post-incarceration behavior may be considered in assessing a claim of mental retardation.

This Court should deny cert on the second question presented for the same reasons. Morris has pointed to no split on whether courts may, for *Atkins* purposes, rely on "post-incarceration evidence" about a defendant's "adaptive deficits." Pet. 19. And even if this Court were to grant cert on this question and reverse, that disposition would not affect the ultimate outcome in this case.

A. There is no split on whether "post-incarceration evidence" can be probative of a defendant's adaptive deficits.

Morris is once again wrong when he asserts that the courts are split on whether they may consider evidence of defendants' post-incarceration behavior when determining whether they suffer from adaptive deficits for *Atkins* purposes. All lower courts have indicated that the factfinder may consider evidence of this sort. Any other rule would preclude the factfinder from considering the most readily available evidence about the defendant and his mental state. The lower courts have uniformly, and wisely, resisted that absurd result.

Morris is simply mistaken when he asserts that three jurisdictions—the Eleventh Circuit, Mississippi, and Texas—have found to the contrary. *See* Pet. 21–22 (citing *Holladay v. Allen*, 555 F.3d 1346 (11th Cir. 2009); *Doss v. State*, 19 So. 3d 690

(Miss. 2009); *Lizcano v. State*. No. AP-75879, 2010 WL 1817772 (Tex. Crim. App. May 5, 2010)). The Eleventh Circuit in *Holladay* did not categorically preclude trial courts from considering post-incarceration evidence. It instead simply noted in the recitation of facts, and then again in a footnote, that certain experts in that case had primarily considered evidence from the defendant's youth in making their assessments because they considered that evidence more reliable than evidence of the defendant's behavior later in his life. *See Holladay*, 555 F.3d at 1351, 1358 n.16. The Mississippi and Texas decisions are even farther off-point. The Mississippi Supreme Court in *Doss* simply rejected an expert's opinion on the defendant's adaptive functioning because it was not normed for subjects in prison and because the expert had not spoken to any witnesses except the defendant. *See Doss*, 19 So. 3d at 711, 714. And the portion of the Texas Court of Criminal Appeals' (unpublished) decision that Morris cites as establishing a "split" is, in fact, a dissenting opinion. *See Lizcano*, 2010 WL 1817772, at *38 (Price, J., concurring and dissenting).

There is thus no split here. All the (majority) decisions that have touched on this issue have indicated that courts may consider post-incarceration evidence in assessing whether a defendant suffers from deficits in his adaptive behavior for *Atkins* purposes. How a court will weigh that evidence, in the light of other, possibly conflicting evidence, will be precisely the sort of contextualized, factbound inquiry that this Court envisioned when it left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences" on mentally retarded

defendants. *Atkins*, 536 U.S at 317. Any categorical rule precluding resort to this evidence would unduly restrict state courts' ability to fashion workable procedures for implementing *Atkins*.

B. Even if this Court were to reverse on the second question presented, it would not change the result.

Likewise, as was the case with the first question presented, this case would be a poor vehicle for resolving the second question because a ruling in Morris's favor would not affect the outcome in his case. Because Morris has not challenged the Court of Criminal Appeals' ruling that he did not establish the third factor of the Alabama Supreme Court's three-part test implementing *Atkins*, his sentence would still be due to be affirmed even if he prevailed on this question. *See supra* at 14-15. There is thus no reason to grant cert on either question presented.

CONCLUSION

The Court should deny Morris's cert petition.

Respectfully submitted,

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